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No. 96-1499

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

C.O.N.T.R.O.L., et al., *Petitioners*,

v.

Kathy Nielsen, Sentry Environmental, L.P., and Texas Natural Resource Conservation Commission, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did a Texas court decide any federal issue in connection with this case?

2. Does the state court decision from which Petitioners seek a writ of certiorari rest entirely on a state law ground?

3. Does the FAA order cited by Petitioners have any preemptive effect over state landfill siting decisions?

LIST OF PARTIES

Petitioners:

C.O.N.T.R.O.L.
City of Argyle
Town of Bartonville
Town of Copper Canyon
City of Haslet
City of Justin
Town of Northlake
City of Roanoke
Argyle Independent School District
Northwest Independent School District
Argyle Volunteer Fire Department
Denton County Electric Coop.
Graham-Argyle Cemetery Association
Prairie Mound Cemetery Association
Justin State Bank
Northwest Regional Airport
Lil Arnold
Rebecca R. Blair
Eric C. Carpenter
Edward H. Coe
David M. Dooley
Bert H. Gibbs
Gibbs Family: Tille H. Gibbs, H. Jarrell Gibbs; and Diane (Gibbs) Nichols
C.J. Hareman Family
Elizabeth C. Morris
Willaim D. Owens, Jr.
Daniel J. Schneider Family
Roger Thompson
Kay Thompson
Lois Thompson
Robert Tracy
Donald A. Wood

Petitioners (cont.):

G.A.S.P.
Carter-Walsh Thoroughbred Farm

Respondents:

Kathy Nielsen
Sentry Environmental, L.P.
Texas Natural Resource Conservation Commission

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Texas Natural Resource Conservation Commission ("TNRCC"), by and through its attorney, the Attorney General of Texas, respectfully requests that this Court deny the Petition for Writ of Certiorari ("Petition") filed by C.O.N.T.R.O.L., *et al.* (collectively, "CONTROL"), seeking review of a state-court opinion entitled *C.O.N.T.R.O.L. v. Sentry Environmental, L.P.*, and reported at 916 S.W.2d 677 (Tex. Ct. App. 1996).[1]

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[1] CONTROL has included an appendix to its Petition. Citations in this Brief in Opposition to items from the appellate record which are reprinted in that appendix will be to "CONTROL App. at __." Citations to the state court decision from which CONTROL seeks a writ of certiorari will be to the reported version (in S.W.2d) as well as to the reprinted text in CONTROL's appendix.

JURISDICTION

In its jurisdictional statement, CONTROL mischaracterizes the procedural background of this case when it asserts that "[t]he Texas Supreme Court, lower courts and the Texas Natural Resource Conservation Commission . . . have decided an important federal preemption question in a manner that conflicts with decisions of the Courts of Appeal and the United States Supreme Court . . . ." (Petition at 2.) As explained below, although TNRCC issued a finding concerning the legal effect of a letter written by a Federal Aviation Administration ("FAA") official, no Texas court has decided the questions that CONTROL now attempts to raise.[2] Instead, and as explained below, the state court judgment from which CONTROL seeks review is based solely on state law. This Court, therefore, has no jurisdiction over that judgment.[3]

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[2] In its jurisdictional statement, CONTROL refers to an order of TNRCC dated March 4, 1994. (Petition at 2.) CONTROL refers again to this "orally pronounced order" in its statement of the case. (*Id.* at 7.) In its Appendix, CONTROL sets forth a "transcribed . . . excerpt" which supposedly constitutes this purported "Oral Finding and Order." *See* CONTROL App. at ii. It should be noted that this item, as set forth in CONTROL's Appendix, does not appear on its face to be an order. More importantly, this item is not part of the appellate record.

[3] Furthermore, CONTROL's assertion that purported decisions of the Texas courts and TNRCC conflict with the decision of this Court in *Hines v. Davidowitz*, 312 U.S. 52 (1940) (*see* Petition at 2), is incorrect. *Hines v. Davidowitz* is a supremacy clause case in which the Court ruled that Pennsylvania's immigration law could not be enforced because Congress had passed a "a single integrated and all-embracing" system for the regulation of aliens, immigration, and naturalization. 312 U.S. at 74. Contrary to the suggestion raised by CONTROL, *Hines v. Davidowitz* does not address the preemptive effect of an internal FAA order.

STATEMENT OF THE CASE

Rule 14(g)(i) of the rules of this Court requires a petitioner to specify, in its statement of the case, "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts." Rule 14(g)(i) also requires "specific reference to the places in the record where the matter appears . . . ." CONTROL fails to comply with this rule.

CONTROL simply lists a group of pleadings and briefs and asserts that petitioners "preserved their position" in those items. (Petition at 7.) CONTROL fails to specify the method and manner in which it raised the federal questions and fails to provide specific reference to the places in the record where those questions were supposedly raised.[4] Further, CONTROL asserts that "[a]t each stage, [its] raising of the federal preemption issue was dismissed or overruled." (Petition at 8.) Again, CONTROL fails to comply with Rule 14(g)(i) in that there are no specific references to places in the record where these issues were passed on by the courts.

CONTROL fails to provide such references because, as further explained below (*infra* at 5-7), no state court ruled on the questions it now attempts to present to this Court. Indeed, no state court below ruled on any federal preemption issue, or on any other issue of federal law.

The following is a concise statement which presents an accurate picture of the facts material to the questions presented:

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[4] Some of the pleadings cited by CONTROL on pages 7-8 of its Petition as having "preserved their position" do not adequately raise the issues that CONTROL now tries to bring before this Court. *See, e.g.*, R. 3 (Plaintiff's Original Petition), R. 56 (Protestant's Motion to Reopen Hearing), 1st Supplemental Record at 2 (Motion for New Trial).

This case began as an appeal, in state district court,[5] of an order of TNRCC, a state administrative agency with jurisdiction over many environmental matters, denying a solid waste landfill permit to Sentry Environmental, L.P. ("Sentry"). CONTROL had opposed the issuance of the permit at the proceeding before TNRCC. Though successful at the agency -- *i.e.*, the permit application was denied -- CONTROL nevertheless sought to appeal TNRCC's decision in state district court, in an attempt to reverse certain TNRCC findings, and to have TNRCC's denial of the permit expanded to include denial on additional grounds. 916 S.W.2d at 678 (CONTROL App. at xlv - xlvi); (R. 12[6] (Plaintiffs' Original Petition)).[7]

TNRCC argued to the district court that CONTROL lacked standing to appeal an agency order under the Texas APA because CONTROL was not "aggrieved by the agency's order." (R. 408-9 (Defendant's Plea in Abatement, Pleas to the Jurisdiction and Defendant's Original Answer).) The district court granted TNRCC's plea and dismissed CONTROL's claims for want of jurisdiction. (R. 439-40 (Order Dismissing Plaintiff's and Plaintiff Intervenor's Claims for Want of Jurisdiction)); CONTROL App. at xxxvi - xxxvii.[8]

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[5] This case was filed as an administrative appeal of a state agency decision pursuant to the judicial review provisions of the Texas Administrative Procedure Act ("APA"), TEX. GOV'T CODE ANN. §§ 2001.171-.178 (West Pamph. 1997).

[6] The appellate record in this case presently resides with the Clerk of the state Court of Appeals, Third District at Austin. Citations to that record will be indicated by "R." followed by the Bates-stamped page number.

[7] CONTROL recognizes, in its Petition, that it was "successful in defeating the landfill permit" and indicates that its present concern is that of a "renewed landfill application by Sentry . . . ." (Petition at 10.)

[8] In reprinting items from the record in its Appendix, CONTROL includes more than the words of the actual items as they appear in the record. For example, following the text of the state district court's order on pages xxxvi and xxxvii of

CONTROL appealed the district court's judgment to the state court of appeals. The appeals court affirmed on the ground that CONTROL lacked standing to challenge the TNRCC's decision since it was not aggrieved. 916 S.W.2d at 679 (CONTROL App. at xlvi). The court further explained that CONTROL's "rights do not include the right to mold an agency determination such that it will thwart future permit applications by Sentry." *Id.* at 679-80 (CONTROL App. at xlix). Although CONTROL had asserted seven additional points of error, the appeals court never addressed them, deciding only that the district court properly dismissed CONTROL's claims for lack of jurisdiction. *Id.*

Following the court of appeal's affirmance of the district court's dismissal, CONTROL applied to the Supreme Court of Texas for a discretionary writ of error. The Supreme Court of Texas summarily denied that application without an opinion. CONTROL App. at lii - liii. CONTROL now seeks review in this Court.

REASONS WHY THE PETITION SHOULD BE DENIED

I. No Texas court decided any federal issue in connection with this case

As stated above, no Texas court has decided any of the federal preemption questions that CONTROL now seeks to present to this Court. An examination of the decision below (*see 916* S.W.2d 677 (CONTROL App. at xli - l)) reveals that the state appellate court decided neither of the questions posed by CONTROL, and, in fact, decided no issue of federal law. Rather, the appellate court affirmed the district court's dismissal of

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CONTROL's Appendix, counsel for CONTROL adds, in parenthesis, editorial comment and argument. (*See* Appendix to Petition at ii, xxxv, xxxvii, xxxviii, xl, xli, l, li, liii, lv.) Only through a careful comparison of CONTROL's Appendix with the actual record can a reader determine what is the verbatim text of the items as they appear in the record, and what is commentary and argument.

CONTROL's claims, deciding solely on state law grounds (*i.e.*, lack of standing under the Texas APA).

The only place where any decision-making body in Texas came anywhere near addressing the questions that CONTROL now attempts to present to this Court is in the TNRCC order that CONTROL initially sought to appeal. That order contained a finding concerning the legal effect of a letter written by an FAA official regarding the proximity of the proposed landfill to an airport. That finding stated as follows:

> The [FAA]'s . . . Order No. 5200.5A provides guidance concerning the location of municipal solid waste landfills within the vicinity of airports. *An FAA letter issued pursuant to this order does not preempt the Commission's authority and duty to determine whether a proposed landfill is compatible with adjacent land uses.* As the FAA order states itself, the FAA neither approves nor disapproves locations of landfill facilities.

(R. 52-3); CONTROL App. at ii, xxxi - xxxii (Order of TNRCC Denying the Application of Sentry Environmental to Operate a Municipal Solid Waste Landfill in Denton County).

As noted above, TNRCC argued to the district court that CONTROL lacked standing under the Texas APA, and the district court dismissed CONTROL's claims for want of jurisdiction. *See supra* at 4. The state appeals court affirmed the district court's judgment on the ground that CONTROL lacked standing to challenge the TNRCC's decision since it was not an aggrieved party. *See* 916 S.W.2d at 679 (CONTROL App. at xlvi). CONTROL's application for a discretionary writ of error to the Supreme Court of Texas was summarily denied without an opinion. *See* CONTROL App. at lii - liii.

Thus, neither the district court, the court of appeals, nor the Supreme Court of Texas ever addressed any issue related to FAA

Order 5200.5A or a letter written pursuant to its guidance including any purported preemptive effect of that order or such a letter, the constitutionality of TEX. HEALTH & SAFETY CODE ANN. § 361.069, or any other supremacy clause or federal law issue.

Since the preemption issues that CONTROL now attempts to raise were not decided by any Texas court, this Court should not visit these questions. *See, e.g., Adams v. Robertson*, ___ U.S. ___, ___, 117 S. Ct. 1028, 1029 (1997)(stating rule that, except for "very rare exceptions," the Court will not consider a federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n. 3, 103 S. Ct. 2296, 2300 n. 3 (1983) (holding that the Court had no jurisdiction to consider a preemption issue where it did not affirmatively appear that the issue was decided in the state courts below); *Illinois v. Gates*, 462 U.S. 213, 218-19, 103 S. Ct. 2317, 2321-22 (1983) (discussing whether the requirement that a federal question be raised and decided in the state court below is jurisdictional or prudential and holding that, in any event, the court would not consider an issue when it was not raised below).

II. The state court's decision rests solely on a state law ground -- *i.e.*, lack of standing under the judicial review provisions of the Texas Administrative Procedure Act.

As noted above, the state appellate court decision from which CONTROL seeks review was decided solely on state law grounds (*i.e.*, lack of standing under the Texas APA). *See* 916 S.W.2d 677 (CONTROL App. at xli - l). The appellate court quoted TEX. GOV'T CODE ANN. § 2001.171,[9] which sets forth the basic right of appeal of state agency decisions in Texas, and held that since

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[9] That section states that "[a] person who has exhausted all administrative remedies available within a state agency *and who is aggrieved* by a final decision in a contested case is entitled to judicial review under this chapter. TEX. GOV'T CODE ANN. § 2001.171(emphasis added).

CONTROL and the other appellants were successful at the agency proceeding, they lacked standing to appeal because they "are not parties who have been aggrieved by a final decision of the [TNRCC]." 916 S.W.2d at 679 (CONTROL App. at xlvi). Because the appellate court overruled CONTROL's first point of error, holding that the trial court properly determined that it lacked jurisdiction, the court did not address any of the other points of error advanced by CONTROL. 916 S.W.2d at 680 (CONTROL App. at xlix).

This court has no jurisdiction to review decisions based on adequate, non-federal grounds. *E.g.*, *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553-54 (1991); *Republican National Committee v. Burton*, 455 U.S. 1301, 1302, 102 S. Ct 1240, 1241 (1982); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S. Ct. 183, 184 (1935). "This rule applies whether the state law ground is substantive or procedural." *Coleman*, 501 U.S. at 729, 111 S. Ct. at 2554; *see also Osbourne v. Ohio*, 485 U.S. 103, 123, 110 S. Ct. 1691, 1703 (1990) (holding that when highest state court ruled, citing state law, that litigant waived right to assert due process challenge because counsel failed to pose an objection at trial, the failure to comply with this procedural rule constituted an adequate state law ground to support the result below and prevented the Supreme Court from reaching the due process contention).

Since the state court decision from which CONTROL seeks a writ of certiorari is based entirely on a state law ground, the Supreme Court of the United States has no jurisdiction over this case.

III. The FAA order at issue is meant exclusively as internal agency guidance and has no preemptive effect whatsoever.

Finally, even if the Court had jurisdiction to review the state court decision at issue and if the Court were inclined to visit the questions presented by CONTROL, it is readily apparent that the

FAA order cited by CONTROL has no preemptive effect over state solid waste landfill siting and permit decisions.

As noted above, TNRCC, in its order denying Sentry's permit, concluded that FAA Order No. 5200.5A "provides *guidance* concerning the location of municipal solid waste landfills within the vicinity of airports." CONTROL App. at xxxi (R. 52)(emphasis added). TNRCC further found that "[a]n FAA letter issued pursuant to this order does not preempt the Commission's authority and duty to determine whether a proposed landfill is compatible with adjacent land uses." *Id.*

This view of FAA Order 5200.5A, and any letter written by an FAA official pursuant to the guidance stated therein, comports completely with the view stated by the FAA itself. The FAA has stated, in a Federal Register notice, as follows:

> The current Order 5200.5A, "Waste Disposal Sites On or Near Airports" . . . contain[s] criteria concerning the establishment, elimination, or monitoring of landfills, open dumps, waste disposal sites, or other similar facilities on or in the vicinity of airports. Orders such as 5200.5A are internal agency directives that provide guidance to FAA employees . . . . *These orders . . . have no authority over facilities located off airport property.* Also, *FAA has no authority to approve or redirect land use outside of the airport perimeter.*

60 Fed. Reg. 27805, 27807 col. 1 (1995)(emphasis added). Therefore, even if the questions presented by CONTROL were properly placed before this Court, the FAA order cited by CONTROL has no preemptive effect over the solid waste landfill siting decisions of a state.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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